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No. 93-1005

Supreme Court, U
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IN THE

Supreme Court Of The United States

October Term 1993

THE HERTZ CORPORATION,

Cross-Petitioner,

v.

THE CITY OF NEW YORK, *et al.*,

Cross-Respondents.

CROSS-PETITION
FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

CROSS-PETITION FOR A WRIT OF CERTIORARI

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December 22, 1993.

QUESTIONS PRESENTED

I. Whether the Second Circuit erred in deciding that the Hertz Law was subject to a rule-of-reason rather than a *per se* analysis under Section 1 of the Sherman Act?

II. Whether the Second Circuit erred in deciding that the rule-of-reason analysis requires the district court to balance New York City's non-competitive justifications for the Hertz Law against the anticompetitive effect of the law?

LIST OF PARTIES

The parties are the same as those listed in the petition for a writ of certiorari filed in *City of New York v. Hertz Corp.*, No. 93-841.

STATEMENT PURSUANT TO SUPREME COURT RULE 29.1

The parent companies and non-wholly owned subsidiaries of The Hertz Corporation are the same as those listed in the brief in opposition to the petition for certiorari filed in *City of New York v. Hertz Corp.*, No. 93-841.

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We ask the Court to consider this cross-petition only if the Court grants the petition for a writ of certiorari filed in *City of New York v. Hertz Corp.*, No. 93-841. If the Court grants the petition, which we oppose as unwarranted and premature, we urge the Court also to grant this cross-petition, because the Court will then be able to consider all of the issues relevant to the antitrust implications of the Hertz Law.[1]

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[1] The entire text of the Hertz Law is set out in the appendix to the petition for a writ of certiorari at A43-44. Hereinafter, references to a number preceded by an "A" are to the aforesaid appendix.

OPINIONS BELOW

The opinions below are the same as those listed in the petition for a writ of certiorari and are reproduced in the appendix to the petition.

JURISDICTION

Cross-petitioner seeks review of the decision of the Second Circuit rendered on August 2, 1993. This cross-petition is filed pursuant to Supreme Court Rule 12.3, in connection with the petition for a writ of certiorari that was received by cross-petitioner on November 26, 1993. The jurisdiction of the Court to review the judgment of the Second Circuit is conferred by 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved are the same as those listed in the petition for a writ of certiorari.

STATEMENT OF THE CASE

The facts here are the same as those set forth on pages 1 - 2 of the brief in opposition to the petition for a writ of certiorari.

ARGUMENT

I. THE SECOND CIRCUIT ERRED IN DECIDING THAT THE HERTZ LAW WAS SUBJECT TO A RULE-OF-REASON RATHER THAN A *PER SE* ANALYSIS UNDER SECTION 1 OF THE SHERMAN ACT.

The Second Circuit incorrectly decided that the Hertz Law should be analyzed under the rule-of-reason test in order to determine whether it is preempted by Section 1 of the Sherman Act, 15 U.S.C. 1 (Supp. 1993). *See Hertz Corp. v. City of New York*, 1 F.3d 121, 129-31 (2d Cir. 1993).[2] Horizontal price-fixing,

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[2] The opinion of the Second Circuit in *Hertz Corp. v. City of New York* is reprinted in its entirety at A1-24.

which the Hertz Law compels, is illegal *per se*. *See, e.g., Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 644-45, 650 (1980) (Court held agreement among wholesalers to eliminate short-term trade credit on beer purchases illegal *per se*); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218, 221, 223-24 (1940) (Court held illegal *per se* combination of major oil companies to fix gasoline prices; "[a]ny combination which tampers with price structures is engaged in an unlawful activity"); *see also United States v. General Motors Corp.*, 384 U.S. 127, 145, 147-48 (1966) (Court held illegal *per se* agreement of dealers, orchestrated by manufacturer, not to sell to discount houses). Thus, the Hertz Law, which involves horizontal price-fixing by eliminating one aspect of price competition and requiring that the same prices be charged to all New York City residents, is unreasonable *per se* under the Sherman Act.

II. THE SECOND CIRCUIT ERRED IN DECIDING THAT THE RULE-OF-REASON ANALYSIS REQUIRES THE DISTRICT COURT TO BALANCE NEW YORK CITY'S NON-COMPETITIVE JUSTIFICATIONS FOR THE HERTZ LAW AGAINST THE ANTICOMPETITIVE EFFECT OF THE LAW.

The Second Circuit incorrectly decided that the rule-of-reason analysis requires the district court to balance New York City's non-competitive justifications for the Hertz Law against the anticompetitive effect of the law. *See Hertz*, 1 F.3d at 130-31. The rule-of-reason analysis, contrary to its name, "does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint's impact on competitive conditions". *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 688, 693-94 (1978) (Court refused to consider, under rule-of-reason analysis, whether "restraint on price competition ultimately inures to the public benefit"); *see, e.g., National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 103, 119-20 (1984) (NCAA agreement with CBS and ABC regarding televising college football games violates the Sherman Act pursuant to the

rule of reason, which is "'confined to a consideration of impact on competitive conditions'" (quoting *National Soc'y*, 435 U.S. at 690)). Therefore, only New York City's procompetitive justifications for the Hertz Law should be weighed against the anticompetitive effect of the law.

CONCLUSION

For the reasons stated above, cross-petitioner/respondent The Hertz Corporation requests the Court to grant this cross-petition only if the Court grants the petition for a writ of certiorari, which Hertz has urged the Court to deny.

December 22, 1993.

Respectfully submitted,

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